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THE EFFECT OF THE WEBB LIQUOR ACT ON LAWS PREVIOUSLY INOPERATIVE.

It often has been said that an unconstitutional law is the same as if it had never been enacted and this principle has been held by the Supreme Court of South Carolina to make it necessary for a state, which had attempted to forbid delivery of liquor shipped to consignee as an article of interstate commerce, to legislate anew on this subject if the state seeks any benefit from the Webb Liquor Act. Atkinson v. Southern Express Co., 78 S. E. 516.

Interestingly the opinion arrays and quotes from decision construing the Wilson Act and distinguishes the Webb Act from that, by showing that the latter released state policy from interference by the interstate commerce clause. The U. S. Supreme Court said, in Vance v. Vandercook, 170 U. S. 444, that: "The right of persons in one state to ship liquor into another state to a resident for his own use is derived from the Constitution of the United States, and does not rest on the grant of the state law."

This language, in its breadth, implies that by this Constitution there is vested in citizens a certain right, but more accurately it may be said, that, incidental to the free flow of commerce among the states, liquor just as another article of commerce is deliverable to a consignee as his property. The right to ship without the right to end a shipment by lawful delivery is such a barren right that the Constitution must be thought to have intended to protect delivery in protection of transportation, but there was no thought of private right as such in this conclusion.

Therefore, when a state attempts, by legislation, to prevent delivery of any article of commerce shipped from one state to another, it encounters an obstacle that makes it inoperative. It attempts control over a subject-matter not yet within the scope of legislative enactment. So long as the subject-matter thus remains, state policy cannot touch it, though the policy as to it be within legislative purview. May this kind of legislation come into force when the barrier against its operation has been removed? The South Carolina Supreme Court said no.

It seems to us the court is wrong and an illustration may show this to be so. Let us suppose that state legislation is enacted forbidding or attempting to forbid any delivery of any shipment in interstate commerce to any consignee of any alcoholic or malt liquor, and an Act of Congress were in existence which made the statute inoperative as to malt liquor, but left state policy effective as to alcoholic liquor. Then again, suppose the Act of Congress were amended so as to bring malt liquor to the status of alcoholic liquor, would not the state law attach? It seems plain that it would.

But, if it would attach, this would be on the theory that the statute was a declaration of policy within the rightful exercise of legislation and it was intended to be operative as to whatever there was or afterwards should come within the sphere of its operation.

The interstate commerce clause stands like a physical or territorial barrier to the operation of state legislation. It does not attempt to dictate state policy, but it advises the state that, however desirable its policy, it must not trespass on national domain, unless Congress gives its consent.

This domain is something like a national reservation within state lines, the punishment for offenses thereon being within federal cognizance. If Congress declared that such offenses were cognizable in the ordinary state venue, state law would not have to be re-enacted for this purpose to have operation over the reservation.

The restriction in the commerce clause is not of the same nature as that forbidding an *ex post facto* law or one impairing the obligation of a contract. A statute for this purpose has no element whatever of

validity about it. But a law, which declares a policy lawful to be declared, and merely by a regulatory provision of the Constitution is limited in its operation, is a different thing.

Thus in Louisville, etc., v. Brewing Co., 223 U. S. 70, it was held an interstate carrier could not be forbidden by state law to deliver an interstate liquor shipment in a dry county, and the court said: "Valid as the Kentucky legislation undoubtedly was as a regulation in respect to intrastate shipments of such articles, it was most obviously never an effective enactment, in so far as it undertook to regulate interstate shipments."

This shows plainly that personal rights were not considered and that there was merely a barrier to a law's operation, notwithstanding that the policy of the law with regard to the same thing on the other side of the barrier was enforceable. It does seem to us that, if that barrier is removed, the law, remaining as it was before, takes in what before was merely exempted. We think it familiar that if an exemption from a general law is repealed or avoided, automatically the law covers what had been exempt.

NOTES OF IMPORTANT DECISIONS

PLEADING AND PRACTICE — JOINT PROMISE, WHERE NO SUFFICIENT CAUSE OF ACTION IS ALLEGED AGAINST EACH PROMISSOR.—We revert to our criticism of decision in State ex rel Dutcher v. Shelton, 156 S. W. 955, to present an interesting view in criticism of what we said. 77 Cent. L. J. 2. The latter criticism takes the view that, though demurrer might lie in favor of one promissor because there is no sufficient facts stated to create a cause of action against him, yet, through jurisdiction of the other promissor depends upon there being a joint promise, this defect being waivable by the venue defendant may not be taken advantage of by the non-venue defendant. We dissent from this view, as we believe that a promissor should not lose his right to be sued in his own county except there be both actually and technically a joint promissor with him. The statute provides for an exception and this is to be strictly construed.

INSURANCE—EXCEPTION IN ACCIDENT POLICY.—For a drastic application of the rule for construing an insurance policy in favor of the assured, a recent decision by Oklahoma Supreme Court seems easily *primus inter pares*. The fact that it is an unanimous affirmance of the trial court merely makes our wonder grow. Standard Accident Ins. Co v. Hite, 132 Pac. 333.

It appears that a drover held an accident policy with an exception from liabilty from injury resulting fatally or otherwise, if received by assured "while on a locomotive, freight car or caboose used for passenger service." He received fatal injuries while riding on a caboose attached to the rear end of a through freight train, he by virtue of his live stock transportation as a drover being along with the employes on the train and the caboose not being part of a mixed train on which passengers might ride. The court held the injuries did not come within the exception and the company was liable.

The court approached the question involved from the standpoint whether the caboose in which the assured was riding was then being "used for passenger service." It must be true that, so far as the assured was concerned, it was so being used, for it often has been held that one traveling as was assured had all the rights of a passenger and if he had such rights he correspondingly sustained the onus of such relation. To free the accident, then, from the exception the court had to carry into the clause the word *general* or some such word as qualifying the service.

But we pass this by, and base our disagreement with the ruling upon the question being treated upon a wholly unreasonable approach. Thus the exception was plainly intended to specify dangerous situations excepted from liability. It objected to any locomotive or freight train transportation, and as part of a freight train it expressly included a "caboose used for passenger service." Without this being said a court would, or might, say a caboose so used was not strictly part of a freight train, but was being offered to and accepted by the public as a passenger train *pro tanto*.

The exception, therefore, seems plainly to mean that assured was not protected *even* on a "caboose used for passenger service." Certainly, if the company is not insuring when one is riding in such a caboose, it could not

be expected to insure when it was not so used, as when riding on the latter one has not the protection that must be accorded to a passenger. It was in insurer's mind, therefore, that a caboose not used for passenger service is merely part of a freight train,—one of its cars—and as so described plainly excepted. We think this the only reasonable way to give life to this excepting clause.

THE LAWYER AND THE LEGISLATURE.

The relation of the attorney and counsellor at law to the courts and to the legislative bodies has always been, and perhaps always will be a matter of some dispute and perplexity. According to the old theory an attorney is essentially and primarily an officer and counsellor and advisor of the court in which he practices. Such being the assumption, the courts throughout the legal history of both England and of America have always evinced an interest in his qualifications, and have ever been jealous of the right and power to ultimately pass upon them. They have, in fact, in the past taken the position that though in certain instances the legislative bodies may say who shall not practice law, they can in no instance positively and finally determine who may and shall. "The powers of the government of this state," said the supreme court of Illinois in the case of In Re Day,[1] "are divided into three distinct departments—legislative, executive and judicial; and no person or collection of persons being one of these departments shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted. . . . This court has never acknowledged the power of the legislature to prescribe the amount of learning which shall qualify an attorney to practice in our courts. . . . The effect of enforcing such a statute would be to degrade the profession and fill the ranks with those not qualified by our rules. . . . In any consideration of the question it must not be forgotten that restrictions upon the privilege of practicing law are created only in the interest of the public welfare, and neither for nor against the student. . . The legislature may enact legislation for the protection of the public against things hurtful or threatening to their safety and welfare. So long as they do not infringe upon the powers properly belonging to the court, they may prescribe reasonable conditions which will exclude from the practice those persons through whom injurious consequences are likely to result to the inhabitants of the state. . . . It will be strange, indeed, if the court can control its own courtroom, and even its own janitor, but that it is not within its power to inquire into the ability of the persons who assist in the administration of justice as its officers. . . . The function of determining whether one who seeks to become an officer of the courts, and conduct cases therein, is sufficiently acquainted with the rules established by the legislature and the court governing the right of parties, and under which justice is administered, pertains to the courts themselves. They must decide whether he has sufficient legal learning to enable him to apply those rules to varying conditions of facts, and to bring the facts and law before the courts, so that a correct conclusion may be reached. . . .The fact that the legislature may prescribe the qualifications of doctors, plumbers, horseshoers and persons following other professions, or callings not connected with the judicial system, and may say what shall be evidence of such qualifications, can have no influence upon this question. . . . The attorney is a necessary part of the judicial system, and his vocation is not merely to find persons who are willing to have law suits. He is the first one to sit in judgment on every case, and whether the court shall be called upon to act depends upon his decision." And historically, at any rate, there is much to be said in support of this position. There can, indeed, be no doubt that the common law has favored judicial, rather than legislative, control, and that the

(1) 181 Ill. 73.

acts of the English Parliament which have dealt with the matter have been content with merely prescribing who should not practice, and have in no instance sought to determine who should.

The right to admit to the bar, indeed, seems at no time to have been considered vested in the English Parliament. Originally it would seem that the king was the fountain head of justice and that no one could appear by attorney in his presence or in the royal courts without his permission. In 1292, Edward I, by ordinance directed the Lord Chief Justice of the court of common pleas and the rest of his fellow justices to, according to their discretion, provide and ordain from every county certain attorneys and apprentices of the best and of the most apt for their learning and skill, who might do service to his court and people and those so chosen only and no others should follow his court and transact the affairs thereof. The same ordinance then suggested that the number of sevenscore was sufficient for the needs of the times, but it was left to the discretion of the justices to add to or to diminish the members. This was before the days of the English Parliament. The rise of that body did not affect the case, however, and as early as the statute of 4 Henry IV. c. 18, it was enacted that attorneys should be examined by the judges and none admitted but such as were virtuous, learned, and sworn to do their duty. As far as the solicitors were concerned, they, from an early time, came to the bar through the inns of court. These were colleges in which students resided and pursued their studies. At an early date lawyers gathered about the court of Westminster, and hospitia curiae were established, which contained schools of law. On the suppression of the Knights Templars, the pope granted their estates to the Knights Hospitallers of St. John of Jerusalem, who leased their buildings in London to the students of the law. The place was called "The Temple," from its former occupants, and the societies of the Inner Temple and the Middle Temple were formed. After the suppression of the Knights Hospitallers by Henry VIII, the society held the Temple buildings of the crown by lease, and in 1608 they were granted by letters patent of James I to the chancellor of the exchequer (a judicial officer) the recorder of London, and the benchers and treasurers of the Inner and Middle Temples, for "lodging, reception and education of the professors and students of the law." At these inns the students of law attended in great numbers, and were instructed in the law and practice. From time to time rules were made for the government of these inns by the judges, or, with their concurrence and the advice and consent of the king or queen and the benchers or societies themselves.[2] The societies submitted for ages to be governed by the rules so made, and in every instance their conduct was subject to the control of the judges as visitors. They were voluntary societies, to which mandamus would not lie, but the ancient and usual way of redress for any grievance was by appealing to the judges as visitors.[3] The origin of their power to call to the bar is lost to the past, but they acted substantially as a board of examiners, subject to the control of the judges as visitors, and their actions were accepted by the courts. The time of study was reduced from longer periods to five years before any student could be called to the bar, unless he was a master of arts or a bachelor of laws of the University of Oxford, Cambridge or Dublin; in their case it might be diminished by two years. He was then called a "barrister." In the old books they were styled apprentices, as in the foregoing order of Edward I, and were not qualified to execute the full office of an advocate until they were of 16 years' standing[4] when they might be advanced to the degree of sergeant. The benchers of the

(2) Dudg. Oreg. Jur., 312, 316, 317, 320.

(3) Booseman's Case, March 177; Rex. v. Benchers of Gray's Inn, 1 Doug. 353; Rex v. Benchers of Lincoln's Inn, 4 Barn. l. c. 855.

(4) 3 Bl. Comm. 27.

inn, who governed the society, were elected from the barristers according to seniority. The English courts, indeed, have never recognized any inchoate right in the citizen to be called to the bar and have refused to interfere by mandamus in order to compel the admission of a student of the inns of the court.[5]

Though, however, the English Parliament seems from its incorporation to have recognized that on account of the fact that attorneys were primarily the officers of the respective courts of the country, the admission of such persons to practice was a matter essentially belonging to these courts, and did not, therefore, attempt to compel the judges to admit any persons whom they deemed incompetent, it nevertheless frequently sought to protect the public against improper persons. The first of these acts was passed in the year 1402. At that time the attorneys of the country had increased to the number of two thousand. The statute recited that damages and mischiefs ensued from the great number of attorneys unlearned in the law, and ordained and established that all attorneys should be examined by the justices and by their discretion put in the roll, and that other attorneys might be put out by the discretion of said justices. In 1413 by a statute Henry V. under sheriffs, sheriffs, clerks, receivers and bailiffs were excluded from practicing as attorneys because "the king's liege people dare not pursue or complain of the extortions and oppressions to them done by the officers of sheriffs." In 1455 Parliament limited the number of attorneys for Suffolk, Norfolk and Norwich,[6] stating that the number had increased to more than eighty, "most of whom, being not of sufficient knowledge, came to fairs, etc., inciting the people to suits for small trespasses." in 1605 the number of attorneys was again regulated.[7]

This was, and is, in a country where Parliament is supreme—is a constitutional convention and a legislative body in one, and is restrained by no written constitution. The British Parliament has, in short, for many years had the ultimate power of control in its hands, but has refused to exercise it. It has refrained from so doing, partly, perhaps, because of an unwillingness to encroach upon the royal perogative and to shatter the ideal and the theory that the courts of law trace their origin to the king. It may possibly have refrained because it has been satisfied with things as they were, and has seen no reason for interfering.

In America, before the days of the adoption of the Federal Constitution and the promulgation of the theory of the tripartite theory of government, there was at first a revulsion of feeling against the courts and against the lawyers. This was but natural, as the courts in a large measure represented the British sovereign and the British sovereign law, and the early history of the country was not only a long protest against the encroachments of that sovereignty, but the pioneer is pre-eminently an individualist, and a sovereign and superinposed law is always distasteful to him. So, too, many of the settlements were congregations, rather than civil communities, and to them the law of the scriptures and of the church was the sole and controlling law. They knew nothing, indeed, of the common law as a legal system. They were religious enthusiasts, and not legal students. In the old world they had seen the law used merely as an agent for royal oppression and for the enforce-

(5) It is true that in the case of King v. Benchers of Lincoln's Inn, 4 Barn. C. 855, the court of Queen's Bench said that "a member who has been suffered to incur expense with a view of being called to the bar, thereby acquires an inchoate right to be called, and if the Benchers refuse to call him they ought to assign a reason for doing so, and if there be no reason, or an insufficient one, the member who has acquired such inchoate right is entitled to have that right perfected. In the particular case, however, the mandamus was refused, and there is no intimation in it that the court would seek to go beyond the findings of the examiners of the inn or recognize an inchoate right whatever in a person not recognized by its authorities.

(6) 33 Henry VI.

(7) 3 Jac. 1, chpt. 7.

ment of a class-made and sanguinary penal code. They were irritated by navigation and commercial acts which restricted their freedom of trade, but which, being the sovereign law, the courts were bound to enforce. They had not yet arrived at the conception of a government by law and not by men, but by a law whose source was in the people and not in the king. The result was naturally a protest against all law but the Divine Law, and against all judges and all lawyers but their own priests and their own ministers.

But order had to come. The law of Moses was soon found inadequate to their growing civilization. It was soon found to emphasize a rule of ethical conduct, rather than to be a guide to every-day business-life. It was not sufficiently specific. It was, at the most, the law of a primitive and more or less nomadic people. Above all, it was the law of a religious hierarchy, and was utterly inconsistent with the growing sense of individualism which for centuries had been stirring in the British blood. There were in it no rules against arbitrary searches and seizures; no habeas corpus acts; no protection to the individual against the tyranny of the priest-craft or the religious intolerance of the mob or the frenzy of momentary passion. The great individualistic struggle of the British race was not in it. The customs and traditions of the Hebrews and of the Semitic races, and not of the Aryans, were crystallized therein. It was, above all, lacking in detail. It was indefinite and uncertain. The British common law was therefore soon again adopted, but modified to suit the local conditions.

With its adoption its system of courts and judges and attorneys were unconsciously adopted, and with it the right of the courts to control their own officers was recognized.

In New York, for instance, attorneys were, prior to the Revolution, appointed by the governor of the colony.[8]. By the constitution of 1777, the power of appointment was vested directly in the courts. The constitution of 1882 was silent on the question. In many or all of the states the degree of ultimate judicial control has been expressly recognized by the legislatures. Where not expressly recognized it has generally been assumed and as yet in no case has there been any legislative or popular protest. We have before referred to the Illinois case of In re Day.[9] In the case of motion to admit Ole Mosness,[10] the statute was as follows: "Any person who has been duly admitted and licensed to practice as an attorney and counselor-at-law in the supreme court of the state of Illinois, and all other states in the union where counsel of this state are admitted as counsel of such state on the same terms hereinafter prescribed, shall be admitted and licensed to practice as an attorney and counselor-at-law in all the courts of this state, upon written application signed by such person, and upon presenting to such court proof that he has been so admitted to practice in the supreme court of Illinois and all other states in the union where counsel of this state are admitted as counsel of such state on the same terms as hereinafter prescribed, and an affidavit of good moral character, and that he is a resident of said state of Illinois. Sec. 2. It shall be the duty of any court of this state, upon application and proof aforesaid, to admit any attorney of the state of Illinois, and all other states of the union where counsel of this state are admitted as counsel of such state on the same terms hereafter prescribed, to practice and to take and subscribe the usual oath required by the laws of this state in relation to attorneys-at-law in this state, and to issue a license as in other cases of admission of attorneys-at-law; and the clerk of such court to enroll the same on his roll of attorneys, as in other cases; and such attorney, so making the application as aforesaid, shall, upon

(8) See People v. Justices of Del., 1 Johns. Cas. 182.

(9) 181 Ill. 73.

(10) 39 Wis. 509.

receiving such license, be entitled to all the privilege of attorneys-at-law resident in this state."

The court on passing on the same and denying the motion to admit, said: "The office of attorney and counsellor of the courts is one of great official trust and responsibility in the administration of justice; one liable to great abuse; and has always been exercised in all courts proceeding according to the course of the common law, subject to strict oversight and summary power of the court. It would be an anomaly, dangerous to the safe administration of justice, that the office should be filled by persons residing beyond the jurisdiction of the court, and practically not subject to its authority. We take it that members of the bar of this state lose their right to practice here by removing from the state. After they become non-residents, they can appear in courts of this state ex gratia only. Our courts cannot have a non-resident bar. This all appears to us to be so very plain, that it is difficult to believe that ch. 50 of 1855 was intended to do more than to authorize the appearance here, as counsel in the trial and argument of causes, of gentlemen of the bar of other states. If intended to do that, it was probably unnecessary. If intended to do more, it was clearly without the power of the legislature." The result of the controversy in America, in short, seems to have been a compromise, and to have culminated in the rule that although the courts may not admit to practice persons or classes of persons whom the legislature, in the exercise of its reasonable discretion and judgment, has decided to be incompetent, the legislature, on the other hand, has no right or power to prove or command that any person possessing certain qualifications or possessing none, shall or must be admitted to practice in the courts, and much less it is authorized to assume the judicial function of determining whether or not such persons actually possess the necessary qualifications. There has, however, as yet, been no rancor evinced over the matter, and no serious dispute in relation thereto. The conclusions of the courts so far have been silently acquiesced in. The courts, indeed, although they have not directly conceded the right of legislative direction in these matters, have been, and will perhaps as time goes on be more and more inclined to conform their conceptions of public policy to that of the legislative bodies. This tendency has already been evidenced in numerous instances where after legislative action in the matter, women have been admitted to practice though they were formerly denied the right by the same courts on grounds of public policy prior to the passage of the statutes.[11] In none of the cases, however, have the courts yielded on a square issue of mental or moral competency, and in the states even where all right of protection seems to have been taken away by the constitutional provisions a subterfuge has been resorted to in order to acquire and retain that control. In the state of Indiana, for instance, where the constitution provides that every person of good moral character being a voter shall be entitled to admission to practice in all the courts of justice without regard to their qualifications as to learning and ability, the courts have sanctioned bar examinations for the purpose of testing qualifications, and ability, and have refused permission to practice to those who have failed, on the theory that no person of a really good moral character would presume to impose upon the public in the practice of a profession for which he was totally unqualified. Where indeed the legislatures alone and without the support of any constitutional provisions have sought to impose gross incompetence upon the courts a vigorous refusal to enforce its decrees has

(11) Compare In re Goodell, 39 Wis. 232; Goodell's Application, 48 Wis. 693; In re Bradwell, 55 Ill. 535; In re Thomas, 16 Colo. 441; Lockwood's Case, 9 Ct. of Cl. 346, 154 U. S. 116; Bradwell's Case, 16 Wall. U. S. 130; In re Stoneman (N. Y.) 53 Am. Rep. 325; In re Leonard, 12 Ore. 93, 53 Am. Rep. 323; Case of Robinson, 131 Mass. 376.

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been everywhere found. In Wisconsin such a statute was passed in the year 1849, but was only not generally obeyed by the nisi prius courts, but disobedience was encouraged by the supreme court of the state. when, in the case of Matter of Goodell,[12] it said: "We do not understand that the circuit courts generally yield to the unwise and unseemly act of 1849, which assumes to force upon the courts, as attorneys, any person of good moral character, however unlearned or even illiterate; however disqualified by nature, education, or habits, for the important trusts of the profession. We learn from the clerk of this court that no application under the statute was ever made here. The good sense of the legislature has long since led to its repeal. And we have too much reliance on the judgment of the legislature to apprehend another such attempt to degrade the courts. The state suffers substantially by every such assault of one branch of the government upon another, and it is the duty of all the co-ordinate branches scrupulously to avoid even all seeming of such. If, unfortunately, such an attack on the dignity of the courts should again be made, it will be time for the courts to inquire whether the rule of admission be within the legislative or the judicial powers. But we will not anticipate such an unwise and unbecoming interference in what so pecularly concerns the courts, whether the power to make it exists or not. In the meantime it is a pleasure to defer to all reasonable rules on the subject." The supreme court of Illinois in a similar case and as we have before seen, openly revolted.[13]

(12) 39 Wis. 232.

(13) See In re Day, supra. In the case of Henry Cooper, 22 N. Y. 67, overruling 10 Abb. Pr. 357, 31 Barb. 353, the court of appeals of New York, it is true, in an illogical and unsatisfactory opinion made a half surrender, but this only in favor of a well-established law school. In the case of State v. Hocker, the Supreme Court of Florida declared invalid a statute creating a state board of bar examiners no surrender of the jurisdiction and control of the court was to be found, but an objection was made on constitutional grounds to the creation of a new and separate board composed of what it held to be "state officers."

So far there has been no popular dissent from these opinions. If dissent there is, to be in the future, we express the hope that it will be against the courts' assumption of power and its placing, as in the case of In re Day, its opinion against that of the legislative body, rather than against the basic proposition that the greatest care possible should be taken to secure a competent and conscientious bar. Every client who loses a case through the incompetency of an attorney becomes to that extent an anarchist. Every one who is defrauded by a lawyer, loses a certain amount of his respect for the sovereign law and government by law. The importance, indeed, in both civil and criminal cases, of honest and public spirited and thoroughly educated counsel who will do their full duty no matter how small the amount of money involved or how much their individual reputation may be at stake, cannot be too often emphasized. We seldom realize how the lack of such men embarrasses the judge. The province of the attorney is not merely to aid his client, but to aid the court. He it is who brings the law to the people and in a large measure by whom it is judged. He is an officer of the court. His province is not merely to advocate, but to aid in the investigating for the much burdened judiciary. If an able and conscientious lawyer will honestly seek out and present all of the facts and all of the law on each side of the case, a fair measure of justice can be done by an impartial court. If this is not done, then the court, itself, must investigate from the beginning, and justice often will not be done. During the year 1908-1909, 411 opinions were filed by the Supreme Court of the United States; 217 cases were disposed of by memoranda and without written opinions, and a large number of minor orders and rules were made and entered. Among these decisions were many which were of great import and which went to the very root of government. Some of them settled the rights of sovereign states, and many of them determined great national and international

policies. Their decision involved not merely the writing of opinions, but the reading of thousands of pages of briefs and records, to say nothing of judicial opinions. How much time, may we ask, had the Supreme Court of the United States to give to original investigation? Yet many of those cases required months of thought. It is to be remembered that during the last year of the judicial life of Chief Justice Marshall, the Supreme Court of the United States only handed down thirty-nine written opinions. With our enormous increase in litigation, and with the increasing burden upon our courts, we find ourselves more and more in need of a bar which shall serve as counsellor to the courts as well as to its clients—at any rate, of a bar which shall thoroughly investigate and thoroughly and honestly present its cases after investigation. Too often, however, counsel are utterly ignorant of their cases, and give to the courts no aid whatever. Not long since, for instance, a case was argued in the Supreme Court of Wisconsin, in which the only point at issue was the legal consequence of the failure of the sheriff to attach his signature to a certain document or writ. The case was argued by counsel on both sides on the theory that there was no such signature, and much law was cited. After the argument, the court met and discussed the case, came to a tentative decision, and one judge was assigned the duty of writing the opinion. He did so, and in it held that the failure of the signature rendered the proceedings invalid. The judges then met as a whole and concurred in the opinion. Just before the decision was handed down, however, the judge who wrote the opinion decided to himself examine the original record. He did so and much to his suprise discovered that after all the signature had been attached. It was of course a simple matter to call back his opinion and to affirm the judgment of the lower court and justice was done in the case, but after an enormous waste of time and energy and money, all of which might have been saved if the lawyers had done but half their duty. This is, of course, an extreme case, but it is illustrative of the point and of the situation. The point is simply that an honest and conscientious and well trained bar not only saves much expense and delay both to the courts and to the litigants, but has much to do with retaining the public respect for law and for government.

We all of us need in this later day, courts and lawyers and the public alike, to cultivate a higher conception of the administration of the law and a higher sense of professional ethics. We all need to get beyond the old idea that a lawsuit is only a battle and that everything is fair in war. The courts need to look over the heads of the fighting attorneys and to fix their vision upon the clients who are represented and of the public itself which in every democratic government is vitally interested in every lawsuit.

The bar needs to cultivate the idea that it is the duty of the lawyer as an officer of the court and as a patriotic and self-respecting citizen to make the trial in the court below as fair and as complete as possible, and in both the lower and upper courts to aid and not to trick the judiciary.

A prominent lawyer, indeed, once told the writer that he had hardly done anything for the past ten years but connive at error and afterwards complain of it. There is too much at stake for this. The only hope for democracy is in a government by law, and there can only be a government by law where that law is respected. No system of government by law will be respected unless its ministers do their part to make it so, and, above all, keep themselves free from taint and free from criticism. The public, in short, cannot take too keen an interest in the legal and ethical training of both its judges and its lawyers. We must remember, too, that the judge of to-day is but the lawyer of yesterday.

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DIVORCE—MAINTENANCE OF CHILD.

DESCH v. DESCH.

Supreme Court of Colorado. May 5, 1913.

122 Pac. 60.

A decree of divorce in favor of the wife, giving her custody of the children but not providing for their support, does not relieve the husband of his obligation to support the children, and the divorced mother may recover a reasonable sum commensurate with his means for necessaries furnished by her for their support if he neglects to support the children.

The parties to this proceeding were divorced at the suit of plaintiff in error, based upon the ground of cruelty of the defendant in error. The decree awarded the sole care, custody, and control of their daughter (a minor) to the plaintiff. The decree made no provision for the support of the daughter. From and after the decree, she remained continuously in the cusody of the mother, who paid all the expenses of her support, aided, in a measure, by contributions of the father from time to time. Plaintiff brought an action to recover from defendant the amounts reasonably and necessarily paid out by her for the child's support subsequent to the date of the decree, above the contributions of the defendant, and also to obtain an order requiring the defendant to make regular payments for the support of the girl during her minority. The court rendered judgment, fixing the amount the defendant should thereafter pay at stated intervals for the child's support, but refused to receive any testimony offered on the part of the plaintiff to establish the amount she had paid for the reasonable support and education of the child above the sums contributed by the defendant; the ruling of the court being that defendant could not recover for any sums paid for the maintenance of the child prior to the commencement of her action. Error is assigned on this ruling.

GABBERT, J. (after stating the facts as above). The law imposes upon the father the obligation to support his minor children to the extent that they are not capable of earning their own livelihood. A decree of divorce at the suit of the wife for his misconduct, which gives the custody of the children to her, but is silent as to their support, does not relieve him of this obligation. If, in such circumstances, he refuses or neglects to support them, the mother may recover from him, in an original action, a reasonable sum for necessaries furnished by her for their support, after such decree, commensurate with his means and station in life. The law implies a promise on his part to pay her for necessaries to this extent. Graham v. Graham, 38 Colo. 453, 88 Pac. 852, 8 L. R. A. (N. S.) 1270, 12 Ann. Cas. 137; Pretzinger v. Pretzinger, 45 Ohio St. 452, 15 N. E. 471, 4 Am. St. Rep. 542; Spencer v. Spencer, 97 Minn. 56, 105 N. W. 483, 2 L. R. A. (N. S.) 851, 114 Am. St. Rep. 695, 7 Ann. Cas. 901; Brown v. Brown, 132 Ga. 712, 64 S. E. 1092, 131 Am. St. Rep. 229; Lukowski v. Lukowski, 108 Mo. App. 204, 83 S. W. 274; Zilley v. Dunwiddie, 98 Wis. 428, 74 N. W. 126, 40 L. R. A. 579, 67 Am. St. Rep. 820; Gilley v. Gilley, 79 Me. 292, 9 Atl. 623, 1 Am. Ct. Rep. 307; Holt v. Holt, 42 Ark. 495; Plaster v. Plaster, 47 Ill. 290; Evans v. Evans, 125 Tenn. 112, 140 S. W. 745.

In the case at bar the decree of divorce was granted on account of the husband's misconduct, and only directs that the mother shall have the custody of the child without any provision for its support. This did not impose upon the mother, as between the father and herself, the obligation to support the child, nor did it release the defendant from the obligation, but leaves that duty which the law imposes upon him subsisting and unimpaired. We are therefore of the opinion that the court erred in ruling that plaintiff could not recover for expenses incurred in supporting the child prior to the commencement of her action over and above the amount contributed by the defendant during that period. There are cases in which the opposite conclusion has been announced; but unquestionably our conclusion is supported by the majority of the recent decisions upon the subject.

An instructive review of cases pro and con on the question will be found in Spencer v. Spencer, supra, reported in 97 Minn. 56, 105 N. W. 483, 2 L. R. A. (N. S.) 851, 114 Am. St. Rep. 695, and also in 7 Ann. Cas. 901. Both annotators find that the weight of modern authority is in accordance with our views. See, also, Alvey v. Hartwig, reported in 106 Md. 254, 67 Atl. 132, 11 L. R .A. (N. S.) 678, 14 Ann. Cas. 250.

Counsel for defendant contends that section 3021, R. S. 1908, which provides that "the expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately," supports the ruling under consideration. That section fixes the liability of husband and wife for family expenses to third parties, and it is not applicable to any

question involved in the case at bar. Graham v. Graham, supra, is also relied upon by defendant to support the ruling of the trial court. In that case the trial court only allowed the plaintiff to recover from the commencement of the suit. The defendant brought the case to this court on error. The plaintiff did not assign cross-errors, so that the question was commenced (that is, denying the right of plaintiff to recover for expenses incurred prior to the commencement of the action) was not involved.

The judgment of the district court in ruling that plaintiff could not recover the expenses incurred by her for the support of the daughter prior to the commencement of her action is reversed, and the case remanded, with instructions to try that issue and render such judgment thereon as the testimony warrants. The judgment, in so far as it is in favor of the plaintiff, is not disturbed.

Judgment reversed in part and cause remanded, with directions.

MUSSER, C. J., and HILL, J. concur.

NOTE.—*Right of Divorced Wife to Sue Husband for Support of Child.*—The general theory of the parent other than the one to whom custody is given being obliged to support the child is that otherwise he might be making his own fault stand as a shield against his obligation. Spencer v. Spencer, 97 Minn. 56, 105 N. W. 483, 2 L. R. A., N. S. 851, 114 Am. St. Rep. 695, 7 Ann. Cas. 901.

It has been said also that the natural obligation resting upon him in the forum of divorce would not become lifeless, because its enforcement was not sought in the jurisdiction in which the divorce was granted. Pretzinger v. Pretzinger, 45 Ohio St. 452, 15 N. E. 471, 4 Am. St. Rep. 542; Zilley v. Dunwiddie, 98 Wis. 428, 74 N. W. 126, 40 L. R. A. 579, 67 Am. St. Rep. 820.

It is said also that one furnishing necessaries, though it be the mother to whom custody has been given, recovers because it is the court enforcing the duty to support. Buckminster v. Buckminster, 38 Vt. 248. The child is not to be deprived of its right to protection and support "because of any family quarrel or of any agreement between husband and wife. It is not a party to any divorce proceeding and it is not barred as to its rights by any decree therein." McAllen v. McAllen, 97 Minn. 77, 106 N. W. 100.

But other cases, and these are not a few, go upon two theories—one that when the father is deprived of custody and services by a decree which commits children to the custody of the mother, the duty to support them no longer exists except as the court may direct in pursuance of statutory authority. Brown v. Smith, 19 R. I. 321, 33 Atl. 466; Johnson v. Ousted, 74 Mich. 437, 42 N. W. 62; Husband v. Husband, 67 Ind. 583.

Pretzinger v. Pretzinger, *supra*, appears to have been modified on this theory in a case where the wife was at fault. Fulton v. Fulton, 52 Ohio St. 238, 39 N. E. 729.

It is thought also that the wife might be deemed voluntarily to have assumed the obligation of support in not asking that husband be required to contribute thereto. Husband v. Husband, *supra*; Hall v. Green, 87 Me. 122, 32 Atl. 796, 47 Am. St. 316.

One case goes to the length of saying that even without an award of custody, and children remain with the mother, who voluntarily supplies them with necessaries, the father is under no implied obligation to pay therefor, he being deprived of or not enjoying their society or services, unless he has in some way manifested his purpose to abandon them. It is argued *a fortiori* he is not bound where the custody is awarded to the wife. Ramsey, 121 Ind. 215, 23 N. E. 69.

It would seem that as to technical ruling to be applied to an independent suit by a mother to recover for such support much might be strenuously urged to defeat her action. But, whether she is seeking for necessaries already furnished or to be furnished, the courts should regard the matter as one to be decided in obedience to a principle that will best enure to the welfare of the offspring of a father who is sued. Therefore, even, if an amount was awarded that was insufficient, the wife furnishing reasonable support should be allowed to recover the deficiency. No provision in a decree to which the helpless child is not a party should in any way operate to its injury. A divorced wife, therefore, suing for support is merely to be regarded as a plaintiff, who appears in the interest of the child. In the divorce suit she appeared in her own interest, and, incidentally, she looked or did not look after the child's welfare. If she looked sufficiently this was well; if not, the child should not be made responsible. It is contrary to public policy that the child should be bound. Therefore, an independent action by any proper custodian should lie. One of the greatest scandals about divorce decrees is, that offspring's rights are so much ignored, when in justice divorces should not be granted at all, unless the paramount rights of children are protected. A divorce should be denied unless the court believes it is to the interest of the child it should be granted. There is no true parent but believes this, and others should be negligible, though they be numerous. C.

ITEMS OF PROFESSIONAL INTEREST.

NEWS FROM CONTINENTAL EUROPE.

"Weltfremdheit" once more. There is always a danger, that a man taking up a specialty shall become narrow in his views, and the more expert he becomes in his special line, the more his general view is apt to be contracted. Lawyers, in this respect, are no different from other specialists, and various steps have been taken, under different sys-

tems, to counterbalance the tendency towards technicality on the bench. With us, the judges are almost invariably recruited from the bar, whereby is generally insured that a man will be obtained having had a wide and general experience in the affairs of life. In other lands, there is a great reluctance in appointing practising lawyers to the bench, it being claimed that, while the attorney has had a wide experience, it has always been of a partisan character, and his employment has made it incumbent upon him, to make use of all sorts of technicalities, in order to strengthen his client's case, or to defeat that of his opponent; that, in other words, he necessarily forms habits of thought, whereby he is impelled to raise lex above jus, to prefer technical correctness to substantial justice. In such countries, they prefer to appoint judges from among the administrative officers of the crown, feeling that, while such may to some extent have been enveloped in red tape, on the other hand they have become acquainted with the affairs of life, with the motives and standpoints of the ordinary man, without having acted in a partisan capacity, and therefore are more likely to consider the merits of a case above its technical weaknesses.

In Germany, however, they have a special manner of selecting their judges. To qualify yourself, in time to become a judge, you have to take a special examination, and having passed, you will, sooner or later, be appointed "assessor" of one of the courts, which means that you are attached to a court, to do the work which, with us is most often delegated to masters, examiners and commissioners. The examination is strict, and the work is bound to develop the legal acumen of the assessor, who in due time will be advanced to a judgeship, and for these reasons the courts of Germany are generally manned by good jurists. But a man may, and, in fact, often does, become a judge without ever having had any practical experience of ordinary business life. and the German Civil Courts do not have juries to correct and neutralize the technical tendencies of the judges. Hence the cry of "Weltfremdheit."

The Prussian Minister of Justice has taken a rather peculiar step in order to overcome this weakness in the judicial timber, with the avowed object of giving the candidates for the bench experience of life. The position of judge will in itself furnish such experience but, as it has been said, of the sick cases of business only; the sound cases need no doctor, and do not come into court. But, in order to diagnose and treat the sick cases properly, it is important and necessary that a reliable knowledge of sound affairs should be acquired; the only way to acquire it, however, is to take an actual part in the sound business of the land.

By a circular letter of July 3, 1912, the minister expresses as his opinion, the desirability of assessors or candidates for assessorships, becoming for a certain length of time employed in ordinary business. As the minister has the main say in making of appointments, such a hint will be taken by all who possibly can. But it is not easy for a lawyer to find employment in other business, especially when he intends to go into it temporarily only. For this reason the society "Recht und Wirtschaft" stepped in and tried to make itself the intermediary between the business man and the young assessor. The methods of an ordinary employment agency could not be used, as there would be practically no call for the services of the assessors. It was necessary to commence a campaign among the larger establishments, and to induce them to grant the assessors permission to work with them; this campaign has mostly been based on patriotic arguments, calling attention to the importance for the whole country, and of each and all classes of business, of having the "Weltfremdheit" driven out of the courts. For the purposes of the campaign, the society appointed a central committee of three, and representative all over the country; the latter are almost all judges who have volunteered to do the local work. The society appears to have been quite successful; until now, 143 different establishments have agreed to receive such assessors for practical instruction, but they appear to be very unevenly distributed over the country, and it seems that where there has been the greatest demand, there has been the smallest offer, and vice versa. The 143 establishments are distributed as follows: banks 10, shipbuilding 2, wholesale houses 15, factories 47, book publishers 1, steamship companies 8, commission merchants 4, railroads (including trolley lines) 3, electrical works 5, real estate and building companies 3, breweries 2, insurance companies 3, co-operative societies 7, large landed estates 33.

The work of the society has the approval of the minister, and each application for employment is made with his consent.

Owing to the short time elapsed since the work commenced, no results can be shown so far, but the men who have taken up the work and devote a great deal of their time and energy thereto, feel hopeful and confident that they have started right, and that the results

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will be bound to show themselves, and to be beneficial.

The German Reichsgericht has decided a rather peculiar case (Urt. II, 826/12, Oct. 29, 1912). A man sat in a hotel lobby and fell asleep. In his hip pocket, which was buttoned, he carried his wallet with his money. A man sitting next to him cut the pocket open below the button and took the pocketbook. The court decided that this was not a case of pick-pocketing, the wallet having been enclosed in a special receptable; that this receptable was attached to the owner's trousers, was of no importance. The thief was convicted of aggravated larceny by the breaking of a receptable. Criminal Code, sec. 243, par. 2.

The same court (Urt. III, 659/12, Nov. 14, 1912) convicted and sentenced a physician for breach of his "duty of silence," as it is called by sec. 300 of the criminal code. A man had employed the doctor to treat a girl for a disease which he had communicated to her. He afterwards refused to pay the doctor's bill. The doctor then called upon the girl's father to pay, without stating the nature of the disease. The father did not pay. The doctor then told the whole story to his attorney, and he filed a complaint, setting forth the nature and origin of the disease. By having this complaint filed, the doctor violated his duty of silence imposed by the above-named section. It may be possible that his bill cannot be collected without explaining the nature of the disease and its origin, but sec. 300 forbids a doctor to divulge to anybody a secret of which he has become possessed in the course of the practice of his profession.

This seems to be a new instance of the new (or rather resurrected) theory of "Schuld ohne Haftung."

AXEL TEISEN.

Philadelphia, Pa.

MEETING OF THE WEST VIRGINIA BAR ASSOCIATION.

The West Virgina Bar Association met July 16-17, 1913, at the Market Auditorium, Wheeling, W. Va.

The address of the president was delivered by Hon. W. G. Mathews, Charleston, W. Va., on "Martial Law in West Virginia." This is a very important and live topic among lawyers in West Virgina and out of it.

Other addresses were delivered as follows: Judge J. C. McWhorter spoke on "Courtesy and Its Abuses in Judicial Administration." Senator W. E. Borah of Idaho took for his subject, "The Lawyer," a very broad and always interesting theme. "The Utilizaton of the State's Water Powers," was discussed by Hon. John J. Cornwell. Judge Benjamin F. Keller delivered the report of the special committee on Judicial Administration and Legal Reform.

BAR ASSOCIATION MEETINGS—WHEN AND WHERE TO BE HELD.

AMERICAN BAR ASSOCIATION—Montreal, Canada, September 1, 2 and 3, 1913.

ARIZONA—Phoenix, some time in November.

CALIFORNIA—San Diego, November, 1913.

MINNESOTA—Mankota, August 19 and 20.

MISSOURI—Kansas City, 3d and 4th week in September, 1913.

MONTANA—Eastern Bar Association, Hunter's Hot Springs, early part of August.

NEVADA—Reno, date not fixed.

NEW MEXICO—Raton, August 12.

NORTH DAKOTA—Mandane, some time during September, 1913.

OREGON—Portland, November, 1913.

VERMONT—Montpelier, October 7, 1913.

VIRGINIA—Hot Springs, July 29, 30 and 31, 1913.

WASHINGTON—July 24, 25 and 26; place not selected.

HUMOR OF THE LAW.

On a writ of error to the supreme court of one of the territories, counsel for the plaintiff in error sharply criticised the rulings of the trial judge. When the counsel for the defendant in error began his reply, the following took place:

"May it please your Honors, before I finish my argument, I think I can show you that the trial judge was not as crazy as counsel on the other side would make him out to be."

By a member of the court: "Let me understand you; you admit the fact of insanity of the trial judge, but deny its degree?"

Jeff Truly, of Natchez, one of the most distinguished as well as the brightest lawyers in Mississippi, is reported to have had the following conversation with the late Bishop Hugh Miller Thompson, of Battle Hill. Said Mr. Truly:

"Bishop, how have you found religion and civilization progressing in this state in the last few years?"

The Bishop replied, "My experience leads me to believe that the farther away you get from the railway, there are perhaps more Baptists, certainly less bath-tubs."

Turning inquisitor, the Bishop said, "By the way, Mr. Truly, how did it happen that when you made the late campaign for governor, you didn't run any better than you did?"

"Oh," replied the Natchez lawyer, "I ran all right; I ran fine under the electric light; it was when I got out into the country where using a tooth brush is a crime, and wearing a night-shirt is a misdemeanor, that I didn't run so well."

XUM

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Bankruptcy**—Attorney Fees.—There is no authority for allowance in bankruptcy proceedings of compensation from the estate for services of an attorney employed by a secured or non-secured creditor.—Mechanics'-American Nat. Bank v. Coleman, C. C. A., 204 Fed. 24.

2.——Discharge.—Bankrupt having purchased and paid for the stock of a corporation largely by drawing checks on funds on deposit in banks in his own name and not having included the same in his schedules in bankruptcy, it was no answer to an objection to his discharge for alleged concealment of assets and because of an alleged false oath to his schedule that the corporation was purchased with the funds of his wife.—In re Diamond, U. S. D. C., 204 Fed. 137.

3.——Liens.—Under Civ. Code Ga. 1910, §3349, relating to crop mortgages, a crop mortgage, though not recorded until after action brought against the mortgagor on a note, held prior to the claim of the holder of the note in bankruptcy; the mortgagor having been declared a bankrupt before recovery of judgment on the note.—In re Beard, U. S. D. C., 204 Fed. 129.

4.——Preference.—Where a transfer by a bankrupt more than four months before bankruptcy was kept secret until within that period, it was declared to be preferential. Gill v. Ely-Norris Safe Co., Mo., 156 S. W. 811.

5.——Selection of Trustee.—Where majority creditors of a bankrupt were represented by attorneys, who had previously represented the bankrupt, and who had solicited the claims, and for this reason were not allowed to vote at the election of a trustee, it was error to deny a continuance, that they might secure other proper representation and participate and proceed to the election of a trustee by the minority.—In re E. A. Walker & Co., U. S. D. C., 204 Fed. 132.

6.——Stay of Execution.—Where no materialman's lien was secured for materials used by a debtor in repair of his homestead, but, judgment having been recovered thereon, the debtor duly scheduled the same as a part of his indebtedness in bankruptcy, he was entitled to a stay of execution on the judgment until one year after adjudication, notwithstanding Const. Minn. art 1, §12, provides that a homestead shall not be exempt from liability for such debts.—In re Hassler, U. S. D. C., 204 Fed. 139.

7.——Wage-Earner.—Where an alleged bankrupt received $100 a month and his expenses while traveling and it was proved that his employer's agreement to pay his expenses was worth $40 a month to him, his compensation exceeded $1,500 a year, and he was therefore not exempt as a wage-earner from bankruptcy adjudication.—In re Hurley, U. S. D. C., 204 Fed. 126.

8. **Banks and Banking**—Certified Check.—While the certification of a draft or check creates a new contract between the holder and the certifying bank, which in effect obligates the bank to pay the check, the bank may be relieved of liability when the rights of no third persons have intervened, and the holder has not changed his position, if the certification was induced by mistake.—Carnegie Trust Co. v. First Nat. Bank, 141 N. Y. Supp. 745.

9.——Trust Fund.—A bank in which a tax collector deposits tax money is liable for a part thereof appropriated by it in payment of a personal debt due it from the tax collector.—State v. Calcasieu Nat. Bank, La. 61. So. 857.

10. **Bills and Notes**—Attorney Fees.—A provision in a note for 10 per cent additional for attorney's fees is in the nature of a penalty and will not be enforced except to provide indemnity to the holder.—Mechanics'-American Nat. Bank v. Coleman, C. C. A., 204 Fed. 24.

11.—Bona Fide Holder.—Knowledge by the purchaser of a negotiable note that it was given for stock in an insolvent corporation, and that on re-organization common stock was given as bonus to subscribers of preferred stock, will not defeat the collection of the note in the hands of an otherwise bona fide holder.—Taylor v. American Nat. Bank, Ga., 78 S. E. 196.

12.——Certificates of Deposit.—Certificates of deposit are promissory notes, and have the same force and effect as a promissory note; indorsers thereon being bound by the same rules that apply to indorsers on a note.—Jensen v. Wilslef, Nev., 132 Pac. 16.

13.——Consideration.—A sufficient consideration for a promissory note in the hands of the payee may be either a substantial equivalent in value received by the maker or a like equivalent parted with by the payee.—Thornton Nat. Bank v. Robertson, Kan., 132 Pac. 193.

14.——Indorser.—An indorser on a note is discharged when payment is extended, unless he is a party to the agreement.—In re Moritz's Estate, Pa., 86 Atl. 875.

15. **Brokers**—Burden of Proof.—A broker, in order to recover commissions, is not bound to

show that he conducted the negotiations to a successful end, but it is sufficient that he has found and introduced to his principal a person ready, willing, and able to make the contract on terms satisfactory to the principal.—Bigham v. Linville, Mo., 156 S. W. 713.

16.——Commissions.—If a broker attempts unsuccessfully to sell land and a proposed purchaser abandons the idea of buying, but is afterwards induced to do so by another not influenced by the broker, the latter is not entitled to a commission.—Lewis v. Manson, La., 61 So. 835.

17.——Duty to Principal.—A buyer of real estate cannot recover from brokers for misrepresentations as to the amount of their commission and the lowest price the seller would take, though the brokers by the misrepresentation made a large profit at the expense of their principal, no damages resulting to plaintiff.—McLennan v. Investment Exch. Co., Mo., 156 S. W. 730.

18.——Performance.—The obligation of the owner to convey real estate is complete on the making of a contract with the duly authorized agent on the terms, and within the time, authorized.—Brady v. Fontenot, La., 61 So. 838.

19. **Cancellation of Instruments**—Antenuptial Agreement.—A tender in court by a widow, suing an administrator and heirs to set aside an antenuptial agreement, of the money received by the widow from the administrator was not necessary to enable her to maintain the action, since she would be entitled to retain such amount in any event.—Robinson v. Robinson, Ky., 156 S. W. 903.

20. **Carriers of Goods**—Limiting Liability.—An express contract with reference to interstate shipments, valuing packages transported at the lowest rate to $50, and limiting the company's liability in case of loss to that sum, is valid.—J. S. Appel Suit & Cloak Co. v. Platt, Colo., 132 Pac. 71.

21.——Perishable Goods.—Where a consignee directed the carrier not to re-ice fish in transit, and decay, resulting from failure to re-ice, made transportation unsafe, the carrier could discharge or destroy the shipment without liability.—Southern Express Co. v. Fant Fish Co., Ga., 78 S. E. 197.

22.——Special Damages.—Where a shipper of household goods notifies the agent that she needs the goods immediately, there is not a sufficient notice of special damages to authorize a recovery for a cold contracted by the shipper, caused by the lack of the household goods shipped.—Alabama & V. Ry. Co. v. McKenna, Miss., 61 So. 823.

23. **Carriers of Live Stock**—Conversion.—Where live stock was consigned by the shipper to his own order and injured in transit, and the shipper refused to receive the injured animals from the carrier, a sale thereof by the carrier was not a conversion.—Cincinnati N. O. & T. P. Ry Co. v. Rankin, Ky., 156 S. W. 400.

24.——Special Damages.—A carrier, informed by a shipper that tents were intended to be used during severe weather as a stable for the protection of his horses, etc., had sufficient notice to render it liable for the expenses and damages which might result by reason of its failure to deliver them within a reasonable time.—Pecos & N. T. Ry. Co. v. Maxwell, Tex., 156 S. W. 548.

25. **Carriers of Passengers**—Ejection.—That a passenger upon being wrongfully ejected before he reached the station which his ticket called for surrendered his ticket and received back his money did not prevent him from recovering damages due to his wrongful ejection.—Whittemore v. Boston & Maine R. R., N. H., 86 Atl. 824.

26. **Compromise and Settlement**—Acceptance of Benefits.—Where one offers a certain sum in full settlement of an unliquidated account on condition that it be in full satisfaction of the claim, its receipt operates as an accord and back his money did not prevent him from reclares that he received it only in part payment.—Chapin v. Little Blue School, Me., 86 Atl. 838.

27. **Contracts**—Duress.—It is not necessary, to constitute duress, that fear of death or bodily harm or imprisonment be engendered.—Liebau v. Miller, Kan., 132 Pac. 173.

28.——Repudiation.—Repudiation of a contract without lawful cause constitutes a breach thereof.—Robson & Evans v. J. R. Hale & Sons, Ga., 78 S. E. 177.

29. **Corporations**—Directors.—A director who has knowledge that a business corporation was receiving deposits of money for safe-keeping and misappropriating them was liable for the misappropriation unless she protested and took steps to prevent loss to the depositors.—Vujacich v. Southern Commercial Co., Cal., 132 Pac. 80.

30.——Directors.—Directors of a corporation cannot vote salaries to themselves, and money paid on account of such votes may be recovered.—Conners v. Conners Bros. Co., Me., 86 Atl. 843.

31.——Indemnity Contract.—An agreement by an officer of a corporation inducing one to purchase stock to personally guarantee the purchaser against loss within five years is a contract of indemnity.—Kenigsberg v. Reninger, Iowa, 141 N. W. 407.

32.——Minority Stockholders.—Minority stockholders may sue for a wrong done the corporation, where the officers refused, after request, to take any action, or where they are so concerned in the wrong that it is reasonably certain that a request would be unavailing.—Chilton v. Bell County Coke & Improvement Co., Ky., 156 S. W. 889.

33.——Ratification.—A corporation is not bound by unauthorized acts of its president, not adopted or ratified by the directors, nor is it bound in equity when the corporation has derived no pecuniary benefit from the contracts or the acts of its president.—Bradshaw v. Knoll, La., 61 So. 839.

34.——Ultra Vires.—Ultra vires was not available as a defense to a suit by a corporation for specific performance of an agreement in a lease to renew, where the original lease had been fully performed and the rent received and retained by the lessors.——Lemp Hunting & Fishing Club v. Cottle, Mo., 156 S. W. 799.

35. **Courts**—Commercial Law.—The effect of a provision for attorney's fees in a note is a matter of general or commercial law, as to which the federal courts are not bound by state decisions.—Mechanics'-American Nat. Bank. v. Coleman, C. C. A., 204 Fed. 24.

36. **Covenants**—Breach.—A covenant against liens and incumbrances is breached upon the

execution and delivery of a deed, if at all.—Texas & P. Ry. Co. v. El Paso & N. E. R. Co., Tex., 156 S. W. 561.

37. **Criminal Law**—Classifying Offenders.—Former conviction is a sufficient basis for the classification of offenders with respect to the severity of punishment.—State v. Adams, Kan., 132 Pac. 171.

38. **Damages**—Remittitur.—Where a large part of the damages awarded were exemplary, the verdict cannot be cured by remittur.—Waltham Piano Co. v. Freeman, Iowa, 141 N. W. 403.

39.——Remoteness.—Where the negligence of defendant's driver caused plaintiff's horse to run away, damages for the depreciation in the value of the horse which had been a gentle animal, but became vicious because of running away, are not too remote to be recovered.—United States Express Co. v. Taylor, Tex., 156 S. W. 617.

40.——Wrongful Act.—Plaintiff may recover damages sustained as a direct result of defendant's wrongful act without regard to whether the particular damage could have been foreseen by defendant.—Whittemore v. Boston & Maine R. R., N. H., 86 Atl. 824.

41. **Deeds**—Delivery.—The registration of a deed raises a presumption of a delivery to and acceptance by the grantee, and the evidence to rebut the presumption must be clear and satisfactory.—Stephens v. Stephens, Ark., 156 S. W. 837.

42.——Restrictions.—A restriction prohibiting the erection of any buildings other than dwellings, apartment, or flat houses, churches, schools, or private garages does not prevent the use of the basement of a dwelling house on the premises for retail trade in food stuffs, where the outward appearance of the building is not changed.—Hoffman v. Parker, Pa., 86 Atl. 864.

43. **Descent and Distribution** — Merger. — Where the equitable and legal estate in land unite in the same person, the equitable title is merged in the legal estate, which descends according to the rules of law, the legal title only determining the course of descent.—Howard v. Grant, Ark., 156 S. W. 433.

44. **Divorce**—Maintenance of Child.—If a husband divorced for his own fault neglects to support the children awarded to the wife, she may recover from him a reasonable sum for necessaries furnished for the children's support.—Desch v. Desch, Colo., 132 Pac. 60.

45. **Dower**—Fraud.—It is not fraud per se for a married man to place his real estate in the name of a third person, so that the rights of the wife thereto shall not attach, but the law will rather impute honesty of purpose.—Asam v. Asam, Pa., 86 Atl. 871.

46. **Ejectment**—Common Source of Title.—Where both parties to an action to recover land claim from a common source of title, the right of recovery depends upon priority of registration of the deeds of the respective parties, and not upon color of title and adverse possession thereunder.—Moore v. Johnson, N. C., 78 S. E. 158.

47. **Eminent Domain**—Dedication.—The owner of the soil may recover damages from the construction of a railroad on a street dedicated by him for ordinary street purposes.—Jarrett Lumber Corporation v. Christopher, Fla., 61 So. 831.

48.——Election of Remedy.—A landowner may waive his right to recover land wrongfully held by a railway company for right of way purposes and sue for damages resulting from the taking.—Texas & P. Ry. Co. v. El Paso & N. E. R. Co., Tex., 156 S. W. 561.

49.——Use of Street.—A railroad did not acquire an irrevocable right to use a street, without compensation, by a franchise from the state to construct a railroad thereon, where the road was not constructed until after the taking effect of a constitutional provision prohibiting the taking or injury of private property without compensation.—Ver Steeg v. Wabash R. Co., Mo., 156 S. W. 689.

50. **Evidence**—Judicial Notice.—Judicial notice will be taken of the fact that, in case of shipments involving the services of connecting carriers, freights not prepaid are collected in a lump sum by the final carrier prior to delivery.—Southern Pac. Co. v. Larabee, Kan., 132 Pac. 205.

51. **Exchange of Property**—Misrepresentation.—Where one exchanging his real estate for merchandise had the fullest opportunity to investigate the merchandise, mere discrepancies from the fact that some of the articles were not in stock, and that other articles were defective, does not justify a finding of intentional misrepresentations, or justify relief.—Fisher v. Trumbauer & Smith, Iowa, 141 N. W. 419.

52. **Executors and Administrators** — Action for Death.—Administrator for a decedent leaving a widow and infant children may not without consideration assign to the widow a cause of action for decedent's death, negligently inflicted, and the widow may not maintain an action for the death.—Flynn v. Chicago Great Western R. Co., Iowa, 141 N. W. 401.

53. **Fraud**—Burden of Proof.—Fraud can be established only by clear and convincing evidence where the party charged with the fraud is dead.—Barnes v. Willis, Fla., 61 So. 828.

54.——Misrepresentation.—One who makes representations professedly not of personal knowledge, but from information obtained from others on which he relies, is liable for misrepresentations where he misstates information, or where he knows or has reason to know that it is not correct.—Peters v. Lohman, Mo., 156 S. W. 783.

55. **Frauds, Statute of**—Part Performance.—The doctrine of part performance of a contract does not take it out of the operation of the statute of frauds when the remedy sought is at law.—Sursa v. Cash, Mo., 156 S. W. 779.

56.——Specific Performance.—Where a bill for specific performance affirmatively shows that the contract violates the statute of frauds, the statute need not be pleaded.—Gachet v. Morton, Ala., 61 So. 817.

57. **Guardian and Ward**—Personal Liability.—Where a guardian purchased railroad stocks and bonds, and sold the bonds alone for a sum equal to the amount invested, and afterwards sold the stock for a certain amount which was a clear profit, he was liable for the proceeds of the stock.—Martinez v. Meyers, Ala., 61 So. 810.

58. **Highways**—Fee.—An owner of land over which a highway runs remains the owner of the fee and of the product of the land on, under, or above the surface, the taking of which will not injure the highway or public use thereof.—Ashurst v. Lohoefner, Mo., 156 S. W. 805.

59. **Homestead**—Mortgage.—Where a mortgagor was single when he executed certain mortgages on his homestead, his subsequent marriage did not render them subject to the homestead exemption.—Presnall v. D. R. Burgess & Co., Ala., 61 So. 804.

60. **Homicide**—Lower Degree.—Where the state's evidence made out a clear case of murder, and defendant's testimony an equally clear case of self-defense, a conviction of voluntary manslaughter should have been set aside.—Kilebrew v. State, Ga., 78 S. E. 205.

61.——Res Gestae.—In a prosecution for murder, the statement by the deceased to the witness, made while deceased was lying upon the floor after having been shot and in the presence of defendant, accusing defendant of having shot her, was admissable.—Aaron v. State, Ala., 61 So. 812.

62. **Husband and Wife**—Abandonment.—Mere statements by accused that he cared no more for his wife than any other respectable woman, and that he did not propose to live with an aggravating woman, does not constitute abandonment, the element of nonsupport being absent.—State v. Toney, N. C., 78 S. E. 156.

63.——Free Trader.—A woman conducting her own business, buying furniture with her separate property, at a time when she was permanently separated from her husband, and only

two months before she was divorced from him, and who ratified the sale after divorce by payments thereon, cannot rely on coverture to defeat the sale.—Peck v. Morgan, Tex., 156 S. W. 917.

64.——Head of Family.—A widow after the death of her husband becomes the head of the family, and her estate was liable for the family necessaries purchased by any member of the family, though over age, whether prior or subsequent to the husband's death.—Graham & Corry v. Work, Iowa, 141 N. W. 428.

65. **Insurance**—Fidelity Bonds.—Delivery of a fidelity bond by the insurer's agent to the employe whose fidelity was guaranteed, with intent that he should deliver such bond to his employer, held a sufficient delivery.—Prosser Power Co. v. United States Fidelity & Guaranty Co,. Wash., 132 Pac. 48.

66.——Forfeiture.—Where insured after a loss fails to separate the damaged goods from the undamaged and to place them in the best possible order, as required by the policy, and sells goods before the insurer can inspect them or appraise the damage, unless compliance with the policy is waived, there can be no recovery. —Farmers' Mercantile Co. v. Farmers' Ins. Co., Iowa, 141 N. W. 447.

67.——Waiver.—The retention by the insurer of the premium paid by the insured does not constitute a waiver of breach of a warranty limiting the amount of concurrent insurance, where the insurer had no notice of the breach.—Harwood v. National Union Fire Ins. Co., Mo., 156 S. W. 475.

68. **Intoxicating Liquors**—Social Club.—In a prosecution for selling intoxicating liquor, it is no defense that accused sold the liquor as the employe of a social club to the members thereof, and that he received no benefit from such sales.—Rothschild v. State, Ga., 78 S. E. 201.

69. **Judgment**—Attorney's Authority.—Where an attorney consents to a compromise judgment in violation of his client's instructions, and this is known to the adverse party, the judgment may be set aside.—Davis v. First Nat. Bank, Ga., 78 S. E. 190.

70. **Landlord and Tenant** — Eviction.—The levy of a landlord's attachment on property subject to a lien for rent, accompanied by a taking possession of the leased premises by the officer to hold the attached property, is not an eviction of the tenant.—Wolf v. Ranck, Iowa, 141 N. W. 442.

71. **Libel and Slander**—New Publication.—Where a newspaper after publishing one libelous article republished the same together with an article ridiculing plaintiff for bringing an action for libel, the second publishing of the article was a new publication which constituted a distinct cause of action.—Ott v. Murphy, Iowa, 141 N. W. 463.

72. **Malicious Prosecution**—Burden of Proof. —The burden of showing want of probable cause is upon plaintiff in an action for malicious prosecution.—Condron v. Carr, 141 N. Y. Supp. 721.

73.——Probable Cause.—A probable cause, which will relieve a prosecutor from liability for instituting a criminal prosecution, is a belief in the guilt of accused, based on circumstances sufficiently strong to induce such a belief in the mind of a reasonable and cautious man.—Callahan v. Kelso, Mo., 156 S. W. 716.

74. **Master and Servant**—Inspection.—Inspection of a car, if necesary to enable a car repairer to repair it, was as much a part of his work as the subsequent making of the repairs, and the fact that he was inspecting the car and not actualy repairing it when injured would not prevent recovery.—Louisville & N. R. Co. v. Mahoney's Admx., Ky., 156 S W. 383.

75.——Master's Assurance.—A promise by an employer to repair defective appliances sufficient to justify reliance thereon by an employe and relieve him from the imputation of assumption of risk may be implied.—Breen v. Iowa Cent. Ry. Co., 141 N. W. 419.

76.——Res Ipsa Loquitur.—The rule of res ipsa loquitur, casting the burden of exculpatory explanation on the party charged, applies where a 2x4 support in a scaffold constructed by the master for painters broke while the scaffold was being used as intended, injuring painters.—Penson v. Inland Empire Paper Co., Wash., 132 Pac. 39.

77.——Res Ipsa Loquitur.—The fall of a staging or scaffolding without any apparent cause may be regarded as prima facie evidence of negligence on the part of the person who prpvided it.—American Shipbuilding Co. v. Lorenski, C. C. A., 204 Fed. 39.

78.——Safe Place.—A master being bound to exercise ordinary care to furnish a safe place for his servants to work, it is not their duty to inspect the place so furnished.—City of Austin v. Gress, Tex., 156 S. W. 535.

79. **Mortgages**—Admissions.—Where a mortgagor, in order to obtain an extension, admitted a specified indebtedness secured by the mortgage, such admission amounted to an adjustment of the account which would not be set aside or reopened except for fraud or mistake. —Presnall v. D. R. Burgess & Co., Ala., 61 So. 804.

80.——Consideration.—Agreement by creditor to use influence to have assignee for the benefit of creditors close out stock of goods at retail in order to realize as much as possible held not a sufficient consideration for an agreement that a mortgage on the homestead owned by the assignor's wife might be extended to cover an unsecured indebtedness.—Mahaska County State Bank v. Brown, Iowa, 141 N. W. 459.

81.——Foreclosure.—A deed of trust may be foreclosed by the holder of the note secured without his first having set aside an attempted unauthorized release by holder of a fraudulent duplicate of the note.—Pouder v. Colvin, Mo., 156 S. W. 483.

82. **Municipal Corporations** — Change of Grade.—The right to damages for a change of a street grade is purely statutory, and no more can be awarded than is specifically authorized by some statute.—In re Cauldwell, 141 N. Y. Supp. 734.

83.——Constitutional Law.—Battle Act, requiring towns to acquire an existing private water system before constructing their own public water system, held unconstitutional as being an invasion of the principle of local self-government which requires that the control of such utilities be left to the sound discretion of the municipal authorities.—Asbury v. Town of Albemarle, N. C., 78 S. E. 146.

84.——Street Obstruction.—To render a city liable for the negligence of its contractor engaged in paving a street in failing to place lights and barriers, it was not necessary that the obstruction causing the injury should have been there sufficiently long to charge the city with notice.—Schlinski v. City of St. Joseph, Mo., 156 S. W. 823.

85. **Negligence**—Attractive Nuisance.—A city was not liable under the doctrine of attractive nuisance for the death of two boys drowned in a pool below a city culvert, where such pool was on the property of a private owner over which the city had no control, and it did not appear that any city officer knew of its existence.—Tavis v. Kansas City, Kan., 132 Pac. 185.

86.——Ordinance.—Where an action for negligent injury is not founded directly upon an ordinance, the ordinance, such as one regulating the speed of vehicles, may be admitted in evidence, like any other material fact, without being pleaded.—Jaquith v. Worden, Wash., 132 Pac. 33.

87.——Proximate Cause. — The "proximate cause" of an injury in the active efficient cause which sets in motion a train of events which causes the injury complained of without the intervention of any force initiated and actively operating from an independent source.—Strayer v. Quincy O. & K. C. R. Co., Mo., 156 S. W. 732.

88. **Parent and Child**—Divorce.—A minor child surviving his divorced mother is entitled to support from his surviving father; and the minor child of a deceased father is entitled to the support of his mother, though she be di-

vorced from her husband, unless such child is possessed of independent means in its own right.—In re Ryan's Estate, Mo., 156 S. W. 759.

89. **Partnership**—Confession of Judgment.—Without special authority a partner cannot by confessing judgment for a firm debt bind the separate estate of his copartner.—Feighan v. Sohers, Pa., 86 Atl. 857.

90. **Payment**—Application.—Where a creditor of a bankrupt, part of whose indebtedness was secured by mortgage and part unsecured, was allowed a dividend on the whole indebtedness, he was entitled to apply the whole dividend on the unsecured indebtedness.—Mahaska County State Bank v. Brown, Iowa, 141 N. W. 459.

91.——Form of.—Payment may be made by the delivery of anything which the debtor agrees to accept in satisfaction of the debt.—Williams v. Uzzell, Ark., 156 S. W. 843.

92.——Unpaid Check.—A debt cannot be discharged with an unpaid check, except upon a clear showing that the creditor at the time accepted such checks absolutely and unconditionally.—Jenses v. Wilslef, Nev., 132 Pac. 16.

93. **Physicians and Surgeons**—Negligence.—Where experts agree that in case of a compound fracture of the jaw the best method becomes largely a question of judgment of the attending surgeon, under the apparent circumtsances of the case, the adoption of a method by a physician does not show negligence or want of skill on his part, though other physicians might not have adopted a different course of treatment.—Cozine v. Moore, Iowa, 141 N. W. 424.

94. **Principal and Agent**—Adverse Interest.—Where the interest of an agent in a particular transaction is adverse to his principal, it will not be presumed that he communicated to the principal facts affecting the transaction; but where the agent acts for the principal, even though he has an opposing personal interest, it will be presumed, in favor of third persons, that he made such communications.—McKenney v. Ellsworth, Cal., 132 Pac. 75.

95. **Principal and Surety**—Equitable Set-Off.—A surety or an indorser for a promissory note, who pays his principal's demand, may, if the principal is insolvent enforce an equitable set-off against any demand sued on by such principal.—Nolan Bros. Lumber Co. v. Dudley Lumber Co., Tenn., 156 S. W. 465.

96.——Notice to Sue.—The administrator of a deceased surety on a note may properly give notice to the holder to sue those primarily liable.—Hammond v. McHargue, Mo., 156 S. W. 725.

97. **Release**—Fraud.—Where a widow was induced to execute a receipt releasing complainant company from all liability arising out of the death of her husband under the misrepresentations that it was for insurance money, etc., such misrepresentation was a direct fraud in the execution of the instrument which could be proven at law.—Drobney v. Lukens Iron & Steel Co., C. C. A., 204 Fed. 11.

98. **Remainders**—Merger.—Where a married woman conveyed to her children land which had been conveyed in trust for her and the heirs of her body, there was no merger; the trust not being executed as to her and she having no heirs while alive.—Case v. Goodman, Mo., 156 S. W. 698.

99. **Sales**—Countermanding Order.—An order for a silo, taken by the seller's agent, which expressly provided that it was not binding on the seller unless accepted by him, could be countermanded by the buyer before acceptance, although it provided that it could not be countermanded either before or after acceptance.—Hargrove v. Crawford, Iowa, 141 N. W. 423.

100.——Entire Contract.—A contract to purchase oats to be delivered in specified amounts each month at separate times for five months is an entire contract of purchase.—Robson & Evans v. J. R. Hale & Sons, Ga., 78 S. E. 177.

101.——Inspection.—Where a purchase was made after inspection, misstatements by the seller as to the cost of the goods could not avoid the sale; the buyer having an opportunity to ascertain the true cost by a little diligence.—Peck v. Morgan, Tex., 156 S. W. 917.

102. **Specific Performance**—Damages.—While contracts for the sale or transfer of government securities or shares of stock, readily obtainable, on the market, will not, as a general rule, be specifically enforced, it is otherwise when the agreement for transfer concerns stock of a different character and contains terms giving the contract special significance, and presenting a case where the ordinary damages in case of breach would be inadaquate.—Misenheimer v. Alexander, N. C., 78 S. E. 161.

103. **Taxation**—Transfer Tax.—Bonds of a foreign company owned by a non-reident are subject to transfer taxes when within the local jurisdiction.—In re Ames' Estate, 141 N. Y. Supp. 793.

104. **Telegraph and Telephones**—Delay.—A telegraph company is not liable for delay in the transmission of a message owing to the fact that its offices were closed on a national holiday.—Western Union Telegraph Co. v. Duke, Ark., 156 S. W. 452.

105.——Place of Contract.—Where the contract for the transmission of a death message was made in Mississippi and the negligence occurred there, and that state did not give damages for mental anguish, held, that there could be recovery therefor in Arkansas.—Western Union Telegraph Co. v. Turley, Ark., 156 S. W. 836.

106. **Trade-Marks and Trade-Names**—Contempt.—One enjoined from using the name "Lenox" in connection with the manufacture and sale of waists held guilty of contempt when he merely changed the name of his business, "Lenox Waist Mfg. Co.," to "Lenox Dress Mfg. Co.," and under that name and at the same place sold dresses and waists manufactured at another point, even though such waists were called "Preferential" waists.—Danziger v. Gottlieb, 141 N. Y. Supp. 739.

107.——Unfair Competition.—Where an advertising agency contracted with plaintiff to run a blind advertisement by printing the word "stopurkicken" without plaintiff's name until the public's curiosity was aroused, when plaintiff's name was to follow in connection therewith, defendant envelope company's use of the word before plaintiff's name had been printed in connection therewith was not unfair competition.—Westminster Laundry Co. v. Hesse Envelope Co., Mo., 156 S. W. 767.

108. **Trusts**—Personalty.—A trust in personalty may be created by parol.—Mantle v. White, Mont., 132 Pac. 22.

109. **Wills**—Acceleration.—Where a testator has particularly specified the time when the gift shall be paid over, there can be no acceleration.—In re Derbyshire's Estate, Pa., 86 Atl. 878.

110.——Conflicting Clauses.—Of two contradictory dispositions of property in a will, the one last written is presumed to be the one which the testator intended to stand.—Succession of Williams, La., 61 So. 852.

111.——Mutual Wills.—The separate wills of two persons, which are reciprocal in their provisions giving the property of each to the other, are mutual wills.—Carle v. Miles, Kan., 132 Pac. 146.

112.——"Sound Mind."—A "sound mind" is one wholly free from delusions, with all the intellectual faculties in a certain degree of vigor and harmony, and under subordination to the judgment and will; the usual test being whether one can talk rationally and sensibly, and is fully capable of any rational act requiring thought, judgment, and reflection.—Rodney v. Burton, Del., 86 Atl. 826.

113.——Testamentary Capacity.—Testamentary capacity may exist, though the testator does not have capacity for the transaction of business; by capacity to make a will is mean intelligence sufficient to understand the act performed, the property to be disposed of, the disposition to be made, and the persons to whom it is being given.—Wolfe v. Whitworth, Mo., 156 S. W. 715.